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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES E. GAMBREL,

Petitioner,

v.

KENTUCKY BOARD OF DENTISTRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

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QUESTIONS PRESENTED

WHETHER PETITIONER JAMES E. GAMBREL WAS DENIED DUE PROCESS BY THE TRIAL COURT'S FAILURE TO CONDUCT AN ORDERLY AND FAIR PROCEEDING AS GUARANTEED BY THE CONSTITUTIONS OF THE UNITED STATES AND COMMONWEALTH OF KENTUCKY?

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NO.

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JAMES E. GAMBREL,[1/]

Petitioner,

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KENTUCKY BOARD OF DENTISTRY,

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PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

1/ James E. Renfro, Sr., an appellant in the Commonwealth of Kentucky Court of Appeals, is not a respondent because the Circuit Court's order finding him in contempt was reversed and remanded with instructions to vacate.

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DECISIONS BELOW

The Kentucky Supreme Court denied the petitioner's motion for discretionary review on April 13, 1982. The decision is unreported. A copy of the order is found in the Appendix, page A-1[2/] The opinion of the Court of Appeals of the Commonwealth of Kentucky, sustaining the issuance of an injunction under KRS Chapter 313 against petitioner, was rendered on December 18, 1981 at 10:00 a.m. This opinion is unreported. A copy of the opinion is found in the Appendix, Page A-2. The Kentucky Court of Appeals also denied petitioner's motion for rehearing on

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2/ A refers to the appendix of this petition.

February 26, 1982. A copy of this order is found in the Appendix at A-12. The injunction and finding of facts and conclusions of law by the Honorable Charles H. Anderson of the Jefferson Circuit Court Third Division on December 30, 1980 at 4:15 p.m. is found at Appendix, page A-13.

JURISDICTIONAL STATEMENT

The petitioner invokes this Court's jurisdiction under 28 U.S.C., Section 1257(3). The order of the Supreme Court of Kentucky was entered on April 13, 1982 at 10:00 a.m. This petition will be timely if filed by mail on or before July 12, 1982 without extension.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT

Which states in pertinent part:

..."nor shall any State deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public Trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

KENTUCKY CONSTITUTION
SECTION 11 BILL OF RIGHTS

In all criminal prosecutions the accused has the right to be heard by himself and Counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the Judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the Defendant and the Commonwealth, the change to be made to the most convenient county in which a fair Trial can be obtained.

STATEMENT OF THE CASE

On December 5, 1976 the respondent filed a complaint against James E. Gambrel, a licensed dental laboratory technician, alleging that he violated the Kentucky Dental Practice Act. In support of its complaint, the Kentucky Board of Dentistry attached an affidavit of Donald L. White, an office associate of the respondent's attorney, alleging that James E. Gambrel had engaged in certain acts constituting the illegal practice of dentistry, thereby violating KRS Chapter 313. The complaint sought a permanent injunction against James E. Gambrel pursuant to the act. James E. Gambrel denied all allegations in the complaint.

Hon. Judge Liebson, Ninth Division, dismissed the action without prejudice because the Kentucky Dental Board had not authorized the action as required by the Dental Practice Act.

At approximately the same time Donald White also obtained a warrant charging Gambrel with a violation of the criminal section of the same Dental Practice Act.

A new cause of action, Case No. 237585 was then filed and assigned to Division Three of the Jefferson Circuit Court. Defendant moved, pursuant to Jefferson County Rule 905, a mandatory transfer rule, to have this case transferred to Division Nine, but was overruled.

The case was heard before the Third Division of the Jefferson Circuit Court, Hon. Charles H. Anderson, together with the case of the Kentucky Board of Dentistry v. James E. Renfro, Sr., No. 55789, a totally unrelated contempt case. The Renfro case was reversed by the Court of Appeals, See Footnote 1. This consolidation of trials was over the objection of James E. Gambrel and James E. Renfro, Sr.

In December 1977 a grand jury indicted Gambrel after a November grand jury refused to issue an indictment. Lowell Thompsen, the respondent's attorney and assistant Commonwealth attorney had the case resubmitted to the December grand jury.

The Trial Court set the commencement of the trial for Friday, May 12, 1978, starting at 3:30 p.m. (Tr. Vol. 1, p. 128) Defense counsel objected (Tr. 127 and 30-31), based on the failure of the Trial Court to follow Civil Rule 40 and Jefferson County Rule 103, as that was the day in whch the Kentucky Bar Association has its convention, and is not to be a Court date. Further, defense counsel objected on the day of trial reporting that he was too ill to proceed. The Court overruled his objection.

An assistant Commonwealth attorney, Lowell Thompson, who was also representing the Kentucky Dental Board, an official agency of the Commonwealth of Kentucky, as a contract attorney,

pursuant to KRS 12.210 was at the trial. Although the Kentucky Dental Association, a private trade association, was not a party to this suit, their counsel, John T. Fowler and John T. Fowler, III, participated in the prosecution of the petitioner over objection. The Fowlers were allowed to participate in the trial in the unusual capacity as attorneys for the members of the Board individually, although the individual members were not parties to either of the actions. (Tr. 6-2-78, p. 48)

The Board of Dentistry called their witnesses on the evening of May 12, 1978. As the trial progressed, petitioner counsel became progressively ill (Tr. 5/12/78, p. 81). He repeatedly

requested the Court to adjourn. Petitioner's counsel was physically unable to cross-examine the respondent's witnesses (Tr. 5/12/78, pp. 88-92). Subsequently, petitioner's counsel was rushed to a hospital emergency room, where he was treated for what was diagnosed as intestinal flu.

The trial continued even though the petitioner was unrepresented by counsel. (Record Vol. II, p. 139) The petitioner was not afforded the opportunity to cross-examine the Board's witnesses. Further, before adjourning for the evening, the trial judge discussed the case with the counsel for respondent and the Kentucky Dental Association. The petitioner Gambrel, who was unrepresented at this time, was excluded from

this discussion. The respondent, having presented all its witnesses, rested its case and the case was continued to June 2, 1978.

On June 2, 1978, the Court first announced the respondent had completed its case (Tr. 6-7-78 p. 10) and the Court entertained directed verdict motions and mistrial motions. Then Hon. Judge Anderson reversed his position over objections and allowed the respondent to continue is case with more testimony (Tr. 5/12/78, p. 21).

Also on June 2, 1978, the Board was allowed to recall its main witness, Donald White, to the stand over objections. At the close of the Board's case on June 2, 1978, the defendants moved again for a directed verdict of acquit-

tal and a mistrial. The defense continued on June 23, 1978, and the trial ended on July 18, 1978. On August 4th, 1978, the trial court held a hearing on petitioner's motion to hold Donald White in contempt for filing a false affidavit in support of the petition for injunction. After the hearing the court refused to hold him in contempt.

On July 24, 1979, the petitioner, Gambrel, was tried criminally, before another division of the same Jefferson Circuit Court on the same facts, under the criminal section of the Dental Practice Act, and the same testimony of Donald White was given. At the end of the Commonwealth's case, the judge gave a directed verdict of acquittal, saying

that the Commonwealth had not met its burden of proof. Two and one-half years later, on December 30, 1980, the trial court rendered its decision and issued an injunction against petitioner James E. Gambrel, although KRS 454.350 requires orders be issued within 90 days.

ARGUMENT

THE PETITIONER JAMES E. GAMBREL WAS DENIED DUE PROCESS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE COMMONWEALTH OF KENTUCKY BY THE TRIAL COURT'S FAILURE TO CONDUCT A FAIR, IMPARTIAL, ORDERLY NON BIASED PROCEEDING AND TO DECIDE THE CASE BASED ON THE STANDARD OF CLEAR AND CONVINCING EVIDENCE.

Justice can only exist where the legal system provides a formal structure in which adversaries can logically present evidence from which they may argue their respective positions. The greatness of the American System of Justice is that the trier of fact, judge or jury, is placed into a structure which removes all of the irrelevancies. The presumption that the judge as trier of fact is capable of extracting relevant information from irrelevant

matters, is overcome when the trial has become bedlam. The refusal of the trial court to follow court rules and laws of this free democratic society deprived the petitioner of due process, a fair trial on his day in court.

The issue of a fair trial with relevant evidence presented in an orderly fashion is an issue separate from that of the bias of the trial court. The due process clause of the Fourteenth Amendment to the United States Constitution requires that a defendant be tried before an unbiased judge. Johnson v. Mississippi, 403 U.S. 212, 216, 29 L.Ed.2d 423, 91 S.Ct. 1778 (1971). This constitutional guarantee presumes that the judge will conduct an orderly procedure with a prompt and

continuing presentation of evidence relevant to the issues raised by the pleading and decide the case by applying the appropriate standard for proof.

> "Perhaps no precise definition can be given it [a fair trial], but it certainly must be one where the accused's legal rights are safeguarded and respected. There must not only be a fair and impartial jury and a learned and upright Judge to instruct the jury and pass upon the legal questions, but there ought to be an atmosphere of calm, in which the witnesses can deliver their testimony without fear and intimidation, and in which the attorneys can assert the defendant's rights freely and fully, and in which the truth may be received and given credence without fear of violence."

Raney v. Commonwealth, 153 S.W.2d 935, 937 (Ky. App. 1941).

To understand the overwhelming bedlam and bias that denied the petitioner his right to due process and a

fair trial, it is necessary to read the entire transcript of a trial that on May 12, 1978 was declared an emergency, which continued until midnight and which would ultimately take two and one-half years to decide. While each incident alone as listed below would probably not in and of itself demonstrate that the trial was unfair, these incidents, taken as a whole and viewed in light of the entire proceedings, demonstrate petitioner's deprivation of due process and a fair trial. The incidents cited will generally be chronological.

1. VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS BY JOINING AN UNRELATED CONTEMPT CASE WITH THE PETITIONER'S CASE FOR TRIAL.

At the beginning of the trial petitioner moved to sever the action

against James E. Renfro from the action against himself. Kentucky Civil Practice Rule 20.01 regarding parties, states:

> "All persons may be joined in one action as Defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, if any question of law or fact common to all Defendants will arise in the action." (Emphasis added)

The Rules, including local Rule 904, clearly require common questions of law and facts for joinder of parties to be proper. Although misjoinder is not a basis for dismissal; it is a basis for severance of actions. Bradford v. Sargaves, 556 S.W.2d 166, 168 (Ky.App. 1978); Adam's Real Estate Corp. v. Ward, 458 S.W.2d 622 (Ky. 1978). The failure

of the trial court to grant the motion to sever the actions against petitioner from that of James E. Renfro, Sr. requires reversal because it was a clear abuse of discretion. Compton v. Commonwealth, 602 S.W.2d 150 (Ky. 1980). In this case, there were no common questions of law nor fact. See Sabastian v. Commonwealth, 623 S.W.2d 880 (Ky. 1981). These actions were initially brought separately and should have been tried separately.

The vast factual difference between the cases and differences in the types of actions clearly required separate trials. The action against James E. Gambrel was an injunction suit, while the action against James E. Renfro, Sr., was a contempt action. The plaintiff's

burden of proof in the case against James E. Renfro, Sr., was proof beyond a reasonable doubt. The plaintiff's burden of proof in the case against James E. Gambrel was based on clear and convincing evidence. The allegations in each suit were unrelated as to time and place and different sections of the Kentucky Dental Practice Act were allegedly violated. Further, there were different witnesses in each action. The trial was incomprehensible with the court constantly switching from one case to the next. The petitioner contends that the Kentucky Court of Appeals committed error in not reversing on this ground and in not allowing the defendant his day in court.

It is arguable that the merger of these two cases in effect should have given petitioner greater protection because of the added safeguards of the Sixth Amendment due to the quasi-criminal nature of the contempt action being tried with petitioner's action. However, the trial court also failed to recognize the alleged contemnor's constitutional rights.[3/]

2. DENIAL OF PETITIONER'S DUE PROCESS RIGHT TO COUNSEL.

Trial assignment of this case was made when petitioner's counsel was out of town. Petitioner's counsel had requested respondent's counsel prior to leaving not to put anything on the

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3/ James E. Renfro, Sr., the alleged contemnor, is not a party to this petition.

motion hour that week. (Record, pp. 127-128) In so doing the court violated CR 40, See Combs v. Griffith, 429 S.W.2d 849 Ky. 1968) and Harlan Coal and Cable v Kinser, 262 S.W. 937 (Ky. 1924).

In this case petitioner's counsel became ill during the initial trial proceeding which was declared an emergency. Petitioner's counsel was unable to cross-examine the Commonwealth's witnesses while he was present. (Tr. 5/12/78, pp. 81-86, 88). Subsequently, he went to the hospital. The court's remarks to petitioner's counsel after he collapsed and was leaving for the hospital suggest a belief that he was faking. This belief was disproved by the deposition of the doctor attending counsel at the

emergency room of Jewish Hospital (See Dr. Friedman's deposition). Once counsel became unable to proceed and especially after he departed for the hospital after collapsing, it became incumbent upon the judge to protect the constitutional rights of the unrepresented accused. Certainly the examination of witnesses is a critical portion of the trial. Even if one were to assume, contrary to the facts, that counsel for petitioner was at fault in departing from the court room, this does not excuse the judge from ignoring the paramount rights of the Defendants to counsel. The trial court failed to understand that the right to counsel is a right of the "accused" and not of the "attorney." The petitioner was unrep-

resented while the trial continued. The judge refused to delay the case, even overnight. Further, he did not ask the petitioner or the party who's case had been joined if they would like to act on their own behalf or have a court appointed attorney act in the absence of their attorney. See RE: Petition of Green, 369 U.S. 689, 8 L.Ed.2d 198, 82 S.Ct. 1114 (1962).

Further the trial judge held ex-parte discussions with the respondent's counsel and the additional counsel for the Kentucky Dental Association. The petitioner was excluded from the discussion and was thereby prejudiced.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public Trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense. (Emphasis Added)

Similarly, §11 of the Bill of Rights in the Kentucky Constitution states:

> In all criminal prosecutions the accused has the right to be heard by himself and Counsel; to demand the nature and cause of the accusation against him; to meet the witnesses fact to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or porperty, unless by the Judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a

speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the Defendant and the Commonwealth, the change to be made to the most convenient county in which a fair Trial can be obtained.

One of the elements of a fair Trial is the right to be represented by Counsel. The United States Supreme Court has held that:

> "That failure to afford the Petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense a right to his day in Court are basic in our system of juris-prudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by Counsel." (Emphasis Added) Re: Oliver, 33 U.S. 267, 273, 92 L.Ed. 682, 694 (1947). See also Argersinger v. Hamlin, 407 U.S. 25, 326 L.Ed.2d 539, 92 §2006 (1972). (Emphasis Added)

The State of Kentucky also considers the right to be represented by counsel, basic to a fair trial. Woods v. Commonwealth, Ky. 305 S.W.2d 935 (1957). McIntosh v. Commonwealth, Ky. 368 S.W.2d 331 (1963); Cane v. Commonwealth, Ky.App. 556 S.W.2d 902 (1977); and May v. Hatterick, Ky. 261 S.W. 1091 (1924) and Ray v. Arnett, Ky. 106 S.W. 828 (1908). This includes the right to have effective assistance at all critical stages of the proceedings against the Defendant, United States v. Smith, 411 F.2d 733 (1969). In Smith, the Sixth Circuit Court of Appeals held that absence of counsel due to illness at the time the verdict was rendered violated the Defendant's Sixth Amendment rights. The additional protections of

the Sixth Amendment and Section 11 of the Kentucky Constitution Bill of Rights were applicable in this case because of the contempt action that was joined with petitioner's. However, the trial court failed to afford these protections to that party and in effect denied petitioner the due process of law that the was entitled.

3. THE TRIAL COURT DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL FACT FINDER.

Petitioner's motion for mistrial based on denial of counsel was denied on June 2, 1982. This was the date the trial was continued to by the trial judge. The trial court attempted to cure the deprivation of due process and counsel by allowing Donald White to

retestify. White's testimony was the only relevant evidence presented by respondent to support the allegations in its complaint, against petitioner, although numerous subpoenaed witnesses, who had no knowledge of the facts in the complaint were paraded before the judge and intimidated by him.

The attempt by the trial court to cure the petitioner's deprivation of counsel at a critical portion of the proceeding must fail because once the deprivation has occurred, the damage has been done and there is nothing that can cure the deprivation. Allowing White to retestify gave the respondent a second opportunity to attempt to prove its case and hurt the petitioner more than helped because the deprivation had occurred and

couldn't be cured unless a new trial were to take place.

The other items which reflect the bias of the trial judge include:

1. The trial judge allowed the participation of counsel for the Kentucky Dental Society, a private trade group who never filed an appearance of Record in this case, over Defendants' objection. (Tr. 5/12/78, pp. 28, 53; 6/2/78, p. 48). See Wood v. Georgia, 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981) and Gibson v Berryhill, 411 U.S. 564, 56 L.Ed.2d 488, 93 S.Ct. 1689 (1973).

2. The trial court judge allowed, over Defendants' objections testimony of several witnesses who had been subpoenaed to testify merely because they were seen in or near the Defendants' place of business, and who knew nothing of the Defendants or the allegation of the Plaintiff's Complaint. This evidence was totally irrelevant and immaterial. (Tr. 6/2/78, pp. 81-90)

3. The trial court judge then intimidated those witnesses

into testifying although they had been subpoenaed through an abuse of the subpoena process. (Tr. 6/2/79, pp. 81-90), CR 45.

4. After it became evident the Plaintiff had failed to prove his case, the trial judge continued the matter until a date three weeks after the initial hearing, although he originally proceeded late into the evening of May 12, 1978 over Defendants' counsel's objection because of the alleged emergency nature of the case. (Tr. 5/12/78, pp. 62, 113)

5. The order entered continuing the trial from May 12, 1978 to June 2, 1978, reflects the judge's bias because it states, "Both parties having appeared in person with Counsel..." when in fact, the Defendants were unrepresented during a portion of the trial.

6. Further the order states, "Part of the proof being heard." Yet, on June 2, 1978, Plaintiff's counsel stated that their proof as to James E. Gambrel was completed. (Tr. 6/2/78, p. 10). The judge unilaterally decided

to reopen James E. Gambrel's case (Tr., p. 17) and allow the Plaintiffs to attempt to cure the defect of May 12, 1978, wherein, Defendants were unable to cross-examine Donald L. White. Before deciding to reopen the case, the judge attempted to force the Defendant to agree that the defect would be cured by having the witness testify again. (Tr. 6/2/78, p. 22)

7. The trial judge denied Defendants' motion for a mistrial based on the conduct of the trial on May 12, 1978. (Tr. 6/2/78, p. 18)

8. The trial court judge denied the admission of Dr. Friedman's evidentiary deposition into evidence, as irrelevant and immaterial. The purpose of introducing this deposition was to satisfy the court that contrary to the trial judge's remarks, Defendants' counsel was not faking an illness. (Tr. 6/2/78, Vol. 1, pp. 16, 18-21).

9. The trial judge denied James E. Gambrel's motion for a directed verdict after the testimony of Donald L. White

was received for a second time and for a second time, the Plaintiffs failed to sustain their burden of proof. (Tr. 6/2/78, Vol. 2, p. 4)

10. The trial judge then attempted to separate the consolidated cases and go forward with the defense of James E. Gambrel.

11. After learning that the Plaintiff's counsel had failed to subpoena the Defendants, the judge was willing to allow a continuance to the Plaintiffs although on May 12, 1978, he would not do so for Defendants. (Tr. 6/2/78, Vol. 2, p. 12)

12. Although the trial judge allowed one woman to leave after she stated she did not want to testify, he did not allow a man to leave who didn't want to testify. (Tr. 6/2/78, Vol. 2, pp. 87-90)

13. The trial judge insulted Defendants' attorney. (Tr. 6/2/78, Vol. 2, pp. 87-90)

14. After it became evident that these witnesses had been improperly subpoenaed and had no knowledge of the Defendants, the trial judge

Rule 12 because he wanted to hear what the Defendants had to say. (Tr. 6/2/78, Vol. 2, p. 160)

20. The trial judge overruled the Defendants' motion for mistrial and motion that the case be heard by a special judge. (Tr. 6/2/78, pp. 169-173)

21. The trial judge's reflection on the atmosphere of the court room filled with sympathizers of Defendants reflects his bias. (Tr. 6/2/78, Vol. 2, p. 181)

22. The trial judge waited two and one-half years before deciding a case which had stood submitted all that time in violation of KRS 454.350.

4. STANDARD OF PROOF.

The trial court violated the petitioner's constitutional rights, by issuing an injunction against him without applying the standard of proof of clear and convincing evidence. The

still refused to exclude the witnesses. (Tr. 6/2/78, Vol. 2, pp. 114, 121, 134)

15. The trial judge thereafter told Defendants' counsels to submit written motions on their objections when previously he acknowledged that written motions were unnecessary. (Tr. 6/2/78, Vol. 2, pp. 5, 125, 134)

16. The trial judge improperly threatened an unsubpoenaed party, who the Plaintiff attempted to call to testify, with contempt and a jail sentence. (Tr. 6/2/78, Vol. 2, pp. 131-135)

17. The trial judge denied Defendants' motion for directed verdict. (Tr. 6/2/78, Vol. 2, p. 152)

18. The trial judge refused Defendants' attorney an opportunity to reply to Plaintiff's response to Defendants' motion. (Tr. 6/2/78, Vol. 2, pp. 153-154)

19. The trial judge overlooked the fact that the Plaintiff's proof must conform to his pleading, and overruled Defendants' motion under

appellate court erred by not reversing on this ground.

In this case, the petitioner Gambrel was tried criminally on the exact same charges, under the same Dental Practice Act and with the same testimony of Donald White (on May 24th, 1978) and received a directed verdict of acquittal. To be placed under an injunction, after this, is a deprivation of the petitioner's 14th Amendment right to due process, especially when the courts refuse to state the standard used for the injunction.

In Santosky v. Kramer, 71 L.Ed.2d 599 (1982) involving the clear and convincing standard, the court said,

> p. 608 The "minimum requirements (of procedural due process) being a matter of federal law, they are not diminished by the fact that the

> State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

The Kentucky Board of Dentistry applied for injunction pursuant to KRS 313.360. This statute relates back to KRS 313.020 and KRS 313.010. The Kentucky Board of Dentistry, the party seeking the injunction, had the burden of proving to the trial court that James E. Gambrel practiced dentistry by engaging in one or more of the acts specified in KRS 313.020 by clear and convincing evidence.

It is clear that this statute, KRS 313.010(2), breaks down into the following elements:

> "Any person shall be regarded as "practicing dentistry":

(1) who, for a fee, salary or other reward paid, or to be paid either to himself, or to another person, performs or advertises to perform, dental operations of any kind,

(2) or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpostions thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and adjacent associated structures,

(3) or who takes impressions of the human teeth or jaws to be used directly in the farication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written laboratory procedure work order of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist,

(4) or who shall advertise, offers, sell or deliver any such substitute or the services rendered in the construction, reproduction, supply or repair thereof to any person other than a licensed dentist,

(5) or who places or adjusts such substitute in the oral cavity of another,

(6) or who uses the words "dentist," "dental surgeon," the letters "D.D.S.," "D.M.D.," or other letters or title in connection with his name, which in any way represents him as being engaged in the practice of dentistry."

The Board apparently was proceeding on element (1), since the other sections of the statute do not seem to fit the facts. Thus, the essential element to the Board's prima facie case was to show that an agreement between Gambrel and White had been reached. The uncontradicted testimony of Donald White demonstrated that no agreements as to price or fee to be paid was ever reached between Mr. Gambrel and Mr. White, and Mr. Gambrel never quoted a fee to Mr. White. Further, no denture or

appliance was ever made by Gambrel or received by White. Yet, the trial court found that James Gambrel quoted Donald White a fee of $175.00. James E. Gambrel argued in his brief to the trial court and appellate court that there was insufficient evidence to support the finding of the trial court. The Kentucky Court of Appeals in its decision responded to that argument by simply stating:

> "We limit ourself to the legal conclusion that such was sufficient to sustain the issuance of any injunction against Mr. Gambrel."

The evidence presented at the trial, which went uncontradicted was that Donald White and James Gambrel never agreed upon a price for a denture, and James E. Gambrel never quoted any

figure or price for any denture. The Court's summary affirmation of the trial court's finding is ambiguous, because it is not clear whether the court is establishing a new prima facie case for the Board by the elimination of proof of an essential element, or if the court is suggesting that the uncontradicted testimony of Donald White satisfied all elements of the Kentucdy Board of Dentistry case.

The testimony of Donald White, clearly establishes that Donald White and James Gambrel never agreed as to a fee to be paid for the denture. Further, no denture was made. The Board clearly did not satisfy all the elements necessary to establish a prima facie case, yet prove its case by clear and convincing evidence.

In Santosky v. Kramer, supra, the court stated:

> p. 609 "But this Court never has approved case-by-case determination of the proper standard of proof for a given proceeding. Standards of proof, like other "procedural due process rules(,) are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." Mathews v. Eldrige, 424 U.S. at 344, 47 L.Ed.2d 18, 96 S.Ct. 893 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessary must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard."

Clearly, the Commonwealth was required to meet a burden of proof in the criminal case against Gambrel and failed to meet it. Likewise the

Commonwealth should be required to meet a burden of proof in a civil injunction case, a burden of clear and convincing evidence. The injunction was issued 2-1/2 years after the dismissal of the criminal charge on the exact same evidence. Although the civil standard is less than that required for a criminal case, the Commonwealth failed to meet either.

The petitioner has been harmed by having an injunction placed against him, in violation of the constitutional standards of proof under the 14th Amendment.

CONCLUSION

For the totality of the reasons set forth above, the petitioner requests that this Court issue a writ of certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY

82-Sc-221-D
(81-CA-1151-MR)

JAMES E. GAMBREL MOVANT

v. JEFFERSON CIRCUIT COURT
C55780, C237585, C238083

KENTUCKY BOARD OF DENTISTRY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of James E. Gambrel for a review of the decision of the Court of Appeals is denied.

Stephens, J., not sitting

ENTERED April 13, 1982.

Chief Justice

OPINION RENDERED: December 18, 1981;
10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 81-CA-1151-MR

JAMES E. RENFRO, SR.
and JAMES E. GAMBREL APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES ANDERSON, JUDGE
Action Nos. C55780, C237585, C238083

KENTUCKY BOARD OF DENTISTRY APPELLEE

AFFIRMING IN PART -
REVERSING AND REMANDING IN PART

****

BEFORE: WHITE, GANT and Howerton, Judges.

WHITE, JUDGE. This appeal arises from the Jefferson Circuit Court in which a

permanent injunction was entered against James E. Gambrel to prohibit him, under KRS Chapter 313, from the illegal practice of dentistry and in which James E. Renfro, Sr., was held in contempt for violation of a previously entered permanent injunction also relating to the illegal practice of dentistry.

Appellants have delineated in chronological form thirty-seven allegations of varying severity upon which to base reversal. It is unnecessary for this Court to address each individually as resolution can be had in summary form.

Appellants initially argue that their cases were consolidated over their objections and ex parte. Four

references to the record are made; however, none supports this contention. This Court is able to find neither that an Order consolidating the actions was entered nor that appellants leveled below any objections to the alleged consolidation. It would appear only that the Circuit Court heard and decided the cases together for its conveniences. No error on this matter preserved.

Trial before the Court was conducted through continuations on four separate dates stretching from May to July 1978. During the May 12 proceedings, for reasons best known to Franklin Yudkin, appellants' counsel, he absented himself from the courtroom and did not return that day. Additional witnesses were heard on behalf of the

Board of Dentistry against both Mr. Gambrel and Mr. Renfro; however, Mr. Yudkin was not present to participate in cross-examinations.

When the matter was resumed on June 2 motions for mistrial and for the striking of the testimony of these witnesses were denied; however, Donald White, a witness against Mr. Gambrel, was recalled for re-examination and cross-examination. Mr. White had been heard on May 12 while Mr. Yudkin was still in the courtroom, but no questions on cross were asked of him at that time.

On June 2 appellants argued against his recall by asserting that the Board was being allowed to present a witness after announcing closed. The hearing of additional testimony after closing is a

matter left to the discretion of the trial court. The opportunity to rehear Mr. White was one done in essence to allow appellants the cross-examination they previously had waived. Under those circumstances, appellants at that time did participate. There is no abuse of discretion. Town of Wingo v. Rhodes, 234 Ky. 385, 28 S.W.2d 465 (1930).

We shall not repeat the contents of Mr. White's testimony. We limit ourselves to the legal conclusion that such was sufficient to sustain the issuance of an injunction against Mr. Gambrel.

With regard to Mr. Renfro, the Circuit Court based its contempt holding upon the deposition testimony of Carolyn Snawder. Ms. Snawder, due to voluntary

commitment, was not present to offer testimony at trial, and the lower Court evidently accepted the deposition under CR 32.01(c)(x) relating to illness.

Nevertheless, the deposition offered was not taken in connection with the present proceeding but rather in one prosecuted against Ms. Snawder by James E. Renfron, Jr. CR 32.01 regarding the use of depositions speaks to use at trial "against any party who was present or represented at the taking." We do not question that the factual issues in the two actions were substantially the same and that Mr. Yudkin did serve as counsel for Mr. Renfro, Jr., at the proceeding as well as for Mr. Renfro, Sr., presently.

Clearly Mr. Renfro, Sr., was not a party to the trial for which Ms. Snawder's deposition was taken. Nor can it be said that his interests were represented there by Mr. Yudkin, for counsel's obligation at that time was not to him but to his son, a stranger to the present action.

The Circuit Court's acceptance of the Snawder deposition was in error as violative both of CR 32.01 and of the constitutional guarantee regarding one's right to confrontation of witnesses.

The Snawder deposition is the only testimony of record against Mr. Renfro which this Court has before it. Earlier in this opinion reference was made to adverse witnesses' being heard at the May 12 proceeding; however, we have

neither transcript nor narrative of that testimony.

It is true that within that filed before this Court is a document purporting to be a transcript from May 12. According to an exchange with the Court on June 23, this was taken from the personal tape recording of Mr. Yudkin and not by an Official Reporter. In June appellants attempted to have such introduced as part of the record; however, this request was properly denied. Mention then was made as an offer through avowal.

Under CR 43.10 an avowal is to serve to preserve that which a witness would have said had an objection to his testimony not have been sustained. It is obvious that this does not meet that standard.

CR 75.13 provides for a narrative statement to be prepared should no stenographic report of the trial be available. Nothing before us indicates that the May 12 "transcript" was ever offered to the Circuit Court for settlement and approval under that Rule.

The alleged May 12 transcript bears no markings that it was, for any purpose, made a part of the Circuit Court record, and its appearance before us is indeed suspect. Nevertheless, its exclusion inures to appellant Renfro's benefit. Eliminating the Snawder deposition and the testimony from May 12 which may or may not have adversely affected his interests, there remains nothing within the record upon which to sustain a contempt holding.

Accordingly, for all the aforementioned reasoning, issuance of an injunction under KRS Chapter 313 against James E. Gambrel is sustained. The contempt holding against James E. Renfro, Sr., is reversed and remanded with instructions to vacate.

ALL CONCUR.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 81-CA-1151-MR

JAMES E. RENFRO, SR.
and JAMES E. GAMBREL — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES ANDERSON, JUDGE
Action Nos. C55780, C237585, C238083

KENTUCKY BOARD OF DENTISTRY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

BEFORE: GANT, HOWERTON and WHITE, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: FEBRUARY 26, 1982

JUDGE, COURT OF APPEALS

JEFFERSON CIRCUIT COURT

No. 237, 585 and 238, 083 THIRD DIVISION

KENTUCKY BOARD OF DENTISTRY PLAINTIFF

VS INJUNCTION

JAMES E. RENFRO, SR. AND JAMES E. GAMBREL DEFENDANTS

****

Motion having been made and proof having been heard and the Court being sufficiently advised and made its Findings herein on the issue of a permanent injunction against James E. Gambrel prohibiting him from practicing dentistry illegally.

IT IS ORDERED AND ADJUDGED that James E. Gambrel is hereby restrained and permanently enjoined from forever hereafter within the geographical limits of the Commonwealth of Kentucky from

engaging in an act or acts which would constitute the practice of dentistry, unless or until James E. Gambrel shall have fully and legally qualified to so practice as defined by KRS 313.

IT IS FURTHER ORDERED that James E. Gambrel pay all costs herein expended.

This is a final appealable order and there is no just reason for delay.

Dated this 30th day of December, 1980.

CHARLES H. ANDERSON, JUDGE

JEFFERSON CIRCUIT COURT

No. 237, 585 and
No. 238, 083 THIRD DIVISION

KENTUCKY BOARD OF DENTISTRY PLAINTIFF

VS OPINION, FINDINGS OF FACTS
AND
CONCLUSIONS OF LAW

JAMES E. RENFRO, SR. AND
JAMES E. GAMBREL DEFENDANTS

****

The matters herein having been heard on several different occasions and the parties herein having filed their Memorandum Briefs and the Court being sufficiently advised, the following is the Opinion, Findings of Facts and Conclusions of Law of the Court.

The two matters were consolidated in this Court and heard together on the Kentucky Board of Dentistry's Petition for permanent injunction against

James E. Gambrel for alleged illegal practice of dentistry and on the Kentucky Board of Dentistry's Motion to hold James E. Renfro, Sr. in contempt of Court for violation of a previous injunction prohibiting him from practicing dentistry illegally.

While the cases were pending decision, the parties on May 9, 1979, tendered an Agreed Order dismissing settled with prejudice as follows:

> "By Agreement of the Plaintiff and certain defendants in the above styled action and the Court being advised,
>
> IT IS ORDERED, that the claim of all Plaintiffs against Kentucky Dental Association Inc. and the Defendants named in the Complaint and Amended Complaint as "all licensed dentists in Kentucky" be and they hereby are, dismissed with prejudice, each plaintiff and the designated Defendants to pay his or its own costs.
>
> There is no just cause for delay, this is final as to the matters adjudicated by this Order."

Agreed to by James Gambrel individual and on behalf of the group designated "all other dental laboratory techinicions licensees" /s/ James Gambrel

Consumer Association of Kentucky Inc.
by: /s/ Franklin S. Yudkin

Citizens for Denturism in Kentucky, Inc.
by: /s/ Brenda Leist Snider, acting president

Citizens for Denturism in Kentucky, Inc.
by: /s/ Franklin S. Yudkin

HAROLD RAY DRUIN (no signature - deceased)

Attorney for Consumer Association of Kentucky, Inc.: /s/ Franklin S. Yudkin

Kentucky Dental Association, Inc.
by: /s/ President (could not read signature)

and by Counsel for Kentucky Dental Association, Inc. and defendants designated as "all licensed dentists in Kentucky: /s/ John T. Ballantine."

As a result of the above Agreed Order and telephone conversations to secretary indicated by note of September 12, 1980, the Court was of the impression that the matter had been disposed of until recently otherwise advised by counsel for individual members of the Kentucky Board of Dentistry, John T. Fowler.

The case originated with the Petition for Injunction and supporting Affidavits filed by attorney Donald White against James Gambrel dated December 5, 1977. The Affidavit and testimony during the trial indicates that on or about May 19, 1977, Donald White visited the dental laboratory known as Gambrel Denture Studio located at 1208 Durrett Lane, Louisville,

Jefferson County, Kentucky. Mr. White's testimony is that he visited Gambrel's studio to request that a partial plate be made for him. He further testified that James E. Gambrel took impressions of his teeth, placed his hands in his mouth for examination, all without a work order or prescription from a licensed dentist. There is no testimony that a licensed dentist was on the premises at the time of Mr. White's examination by James E. Gambrel.

The testimony also is that at the completion of the examination of Mr. White by Mr. Gambrel, Mr. Gambrel quoted Mr. White a fee for services of $175.00 for the dental work.

Defendant, Gambrel, is opposing these allegations offers evidence that

no actual money was every paid for the teeth. Further, that James E. Gambrel had authority to take impressions of the human teeth because he was a licensed dental laboratory technician and so authorized pursuant to KRS 313.510. Defendant also raised question concerning entrapment. It appears from the evidence and this court finds that Donald White was an associate of Lowell V. Thompson, attorney for the Kentucky Board of Dentistry during the time he visited Defendant's dental laboratory.

The action against James E. Renfro, Sr. is that he violated a previously entered permanent injunction prohibiting him from the practice of dentistry. The testimony offered

against James E. Renfro is that Carol Sue Snawder was treated by James E. Renfro, Sr. without an authorized prescription from a licensed dentist. The evidence indicates that James E. Renfro, Sr. was not a licensed dentist and did not have a work order from a licensed dentist nor was there a licensed dentist on the premises during the time of Carol Sue Snawder's examination.

The Court is of the opinion and finds that James E. Gambrel saw Donald White as a "patient" on or about May 19, 1977, at Gambrel's Denture Studio at 1208 Durrett Lane, Louisvile, Jefferson County, Ky.

Further, that James E. Gambrel took impressions of Mr. White's teeth, placed

his hands in the mount of Donald White and made a partial plate for Donald White and quoted him a fee of $175.00 for the services.

The Court further finds that Donald White did not have a work from a licensed dentist nor was James E. Gambrel a licensed dentist practicing dentistry in the State of Kentucky in accordance with the law.

Further, that there was not a licensed dentist on the premises at the time of Donald White's visit. The Court further finds that regardless of the fact that no money actually exchanged hands there was offered services of a dental nature or of a dentist for a fee to be paid in the future.

The Court further finds that James E. Gambrel is not a "licensed" dental laboratory technician pursuant to Statute, but that he is a registered dental laboratory technician pursuant to KRS 313.510 and as a registered dental laboratory technician James E. Gambrel does not have authority under the Statute to make impressions of the human teeth or to construct the fabrication of any intraoral appliance without the written order or prescription from a licensed dentist.

The Court is of the opinion and further finds that there is insufficient evidence for a finding of entrapment.

As to James E. Renfro, Sr., the evidence clearly establishes that James E. Renfro, Sr. treated Carol Sue

Snawder without a work order or prescription from a licensed dentist, neither was there a licensed dentist on the premises. The Court finds that James E. Renfro was not a dentist licensed to practice dentistry in the State of Kentucky.

Therefore, the Court finds that James E. Renfro, Sr. violated the terms of his previous injunction which prohibited him from practicing dentistry illegally.

The Court concludes that pursuant to KRS 313.010:

> "Any person shall be regarded as practicing dentistry" who, for a fee, salary or other reward paid, or to be paid either to himself, or to another person, performs or advertises to perform, dental operations of any kind, or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpositions

thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and adjacent associated structures, or who takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written order or prescription of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist,..."

The Court further concludes that a registered dental laboratory technician has no authority to charge a fee, salary or reward paid or quote a fee to be paid at some point in the future unless he has a work order from a licensed dentist or that there is a licensed dentist on the premises. Further, that a registered dental laboratory technician

should not take impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance without the work order or prescription from a licensed dentist.

The Court also concludes as a matter of law, pursuant to KRS 313.010, that James E. Gambrel violated KRS 313.010 when he practiced dentistry on Donald White. Further, the evidence shows clearly by Mr. Gambrel's activity that he will continue to practice dentistry without authority and that the public interest of health and welfare requires that he be restrained.

The Court further concludes that James E. Renfro, Sr. did violate the terms of his prevously entered permanent injunction of June 2, 1961 by making

impressions of teeth without a work order or prescription from a licensed dentist or without a licensed dentist being on the premises.

Now, therefore, a permanent injunction shall be entered gainst James E. Gambrel, individually, prohibiting James E. Gambrel from violating KRS 313.010 Subsection 2. Further, the Court concludes that James E. Renfro, Sr. is in violation of the Court's permanent injunction of June 2, 1961, which prohibited him from practicing dentistry illegally and, consequently, James E. Renfro, Sr. shall be fined $500.00 and an injunction entered against James E. Gambrel and an

Order assessing penalty of $500.00 fined agaist James E. Renfro, Sr.

Dated this 30th day of December, 1980.

CHARLES H. ANDERSON, JUDGE

82-47

No.

FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES R. GAMBREL, ... Petitioner,

versus

KENTUCKY BOARD OF DENTISTRY, - Respondent.

RESPONSE TO A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

JAMES E. GAMBREL, - - - - *Petitioner,*

v.

KENTUCKY BOARD OF DENTISTRY, - *Respondent.*

RESPONSE TO A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

COUNTERSTATEMENT OF THE CASE

The Appellee, Kentucky Board of Dentistry, does not accept the appellant's statement of the case and desires to set forth matters essential to a fair and adequate statement of the case before this Court.

This appeal arises from two similar actions which were consolidated for a non-jury trial. The two actions were: *Kentucky Board of Dentistry* v. *James Gambrel,* Jefferson Circuit Court, No. 237585, and *Kentucky Board of Dentistry* v. *James Renfro, Sr.,* Jefferson Circuit Court, No. 55789. Both cases involved actions by the Kentucky Board of Dentistry pursuant to KRS 313.020 to enforce the Kentucky Dental Law. One case involved an injunction in equity and the other case involved a violation of a previously existing injunction. The Appellee will only address the case of James E. Gambrel.

On December 5, 1976, the Appellee filed a verified Petition for an injunction and an Affidavit in Support of the Petition for Injunction pursuant to KRS 313.360. The Affidavit in Support of Injunction was signed by Mr. Donald White, Attorney at Law. The Petition states that the members of the Kentucky Board of Dentistry are duly appointed in accordance with the provisions of KRS 313.200 and that it is their duty to administer and enforce the provisions of that Chapter. Pursuant to KRS 313.020, no person shall practice or attempt to practice dentistry in the Commonwealth of Kentucky unless licensed to do so by the Board of Dentistry.

In the Affidavit of Mr. Donald White in support of the Petition of Injunction, the Affiant stated that on May 19, 1977, he visited the Gambrel denture studio in Louisville, Jefferson County, Kentucky, and that at this time and place, he met with the Appellant, James Gambrel. Mr. White, by the Affidavit, further states that Mr. James Gambrel examined his mouth and took an impression of his teeth, and it was agreed that he would pay the Appellant approximately One Hundred Seventy-Five Dollars ($175.00) for a partial plate. On April 24, 1978, the Jefferson Circuit Court, by its Order, scheduled a petition for injunction against James E. Gambrel, and set a hearing date of May 12, 1978.

On May 12, 1978, the Appellee laid the foundation for documentary evidence against James E. Gambrel. Carolyn Fitzmayer, Administrative Secretary to the Kentucky Board of Dentistry, stated that it is her duty

to maintain the records of individuals licensed to practice in the State of Kentucky, and that James Gambrel was not a licensed dentist. Mrs. Doris Denton of Louisville, Kentucky, testified that sometime during April of 1978 she had gone to Gambrel's denture studio on Durrett Lane to have an upper plate made. She states that she did not have a work order or prescription from a licensed dentist and that James Gambrel did not ask her for a prescription or a work order at that time. (T.E. Volume 1, May 12, 1978, page 86). She states that on her first visit, James Gambrel took an impression of her mouth, and that on the second visit, he fitted the dentures in her mouth and that on the third visit, he gave her the completed upper plate for which she paid him One Hundred Five Dollars ($105.00) by check. (T.E., p. 87).

The Appellee next called Mrs. Betty L. Adcock of Louisville, Kentucky. She stated that she went to see James Gambrel at his place of business on Durrett Lane, and that James Gambrel made both upper and lower full dentures for her. She states that the Respondent took impressions of her mouth and that she made four (4) different visits to see him. She further indicated that she did not have a work order or authorization or prescription from a licensed dentist and that Mr. Gambrel did not ask her for one. She further testified that she paid the Respondent One Hundred Seventy-Five Dollars ($175.00) and that she had last seen him when she picked up her dentures the

previous Friday, and that this transaction occurred in Jefferson County, Kentucky.

Mr. Donald White also testified on behalf of the Kentucky Board of Dentistry and stated that on May 19, 1977, he went to see James Gambrel at his denture studio. Mr. White testified that he did not have a work order or a prescription from a licensed dentist and that Mr. Gambrel did not tell him that one was necessary. (T.E. Volume 1, May 12, 1978, p. 92). Mr. White stated that he explained to Mr. Gambrel that he had broken an upper partial plate and needed a replacement. Mr. White further testified that the Appellant, Mr. Gambrel, took an impression of his mouth using a soft plastic material which the Appellant held in Mr. White's mouth during the time it took to harden the mold. Mr. White stated that he did agree to pay the Respondent for the approximate amount of One Hundred Seventy-Five Dollars ($175.00). (T.E. dated 10-18-78, p. 146).

ARGUMENT

THE PETITIONER WAS NOT DENIED DUE PROCESS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BY THE TRIAL COURT.

1. The Petitioner's Right to a Due Process Trial Was Not Violated by the Trial Court Joining for Trial the Case of the *Kentucky Board of Dentistry* v. *James Renfro, Jr.*

"All persons may be joined in one action as Defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same trans-

> action, occurrence, or series of transactions or occurrences, if any question of the law or fact common to all Defendants will arise in the action."

This rule shows that common questions of law and fact for joinder of parties are proper. A separate rule addresses itself to the consolidation of trials. Kentucky Civil Practice Rule 42.01 states as follows:

> "When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or a trial of any or all the matters at issue in the action; it may order all actions to be consolidated; it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Kentucky courts have consistently held that consolidation of cases is discretionary with the trial court and will not be overturned unless a clear abuse of discretion is shown. *Adams Real Estate Corporation* v. *Ward,* Ky., 458 S. W. 2d 622 (1970). Whether a seperate trial should be granted is a matter within the sound discretion of the trial judge. Before a jointly indicted Defendant is entitled to a separate trial, he must timely demonstrate to the trial judge that he will be prejudiced by a joint trial. *Bunton* v. *Commonwealth,* Ky., 464 S. W. 2d 810 (1971). *Rachael* v. *Commonwealth,* Ky., 523 S. W. 2d 395 (1975). This trial court did not abuse its discretion by consolidating these two actions for trial in view of the fact that both cases involved a common question of law as to whether

or not the Kentucky Statute KRS 313 concerning the illegal practice of dentistry was violated.

The Appellant cites as authority the case of *Compton* v. *Commonwealth,* Ky., 602 S. W. 2d 150 (1980), but this action only codifies long standing Kentucky cases which hold that the trial judge has broad discretion in granting or refusing to grant a severance, and the ruling will not be disturbed unless there is a clear abuse of discretion.

At this time, the Court should consider the facts surrounding the action against James Renfro, Jr., to determine whether the Petitioner was prejudiced.

The case against James E. Renfro, Jr. as presented by the Kentucky Board of Dentistry consisted of the following documentary evidence: the Kentucky Board of Dentistry proved that on or about June 12, 1961 the Kentucky State Board of Dental Examiners (now Kentucky Board of Dentistry) and James Renfro, Sr., entered into an Agreed Judgment whereby James Renfro was permanently enjoined and restrained from practicing dentistry or attempting to practice dentistry and/or the commission of any act defined in KRS 313.010. On December 20, 1976, the Kentucky Board of Dentistry filed a motion for rule for James Renfro to show cause, if any he had, why he should not be held in contempt for his failure to comply with this Court's order of June 2, 1961. This Motion for Rule was supported by the Affidavit of Lowell V. Thompson, Jr., then legal counsel for the Kentucky Board of Dentistry. In his Affidavit, the Affiant restated the terms of the Agreed Judgment and

stated that James Renfro had failed or refused to comply with the Court's order in that on or about May 26, 1976, James Renfro, Sr., engaged in the practice of dentistry without a license. The Affiant's Affidavit further stated that on or about October 4, 1976, a hearing was held in the criminal branch of the Jefferson Quarterly Court on a warrant taken by Carolyn Sue Snawder and that at said time and place, James Renfro was found guilty. The hearing on this contempt rule was scheduled for May 12, 1978, consolidated and to be heard at the same time as the injunction action against James Gambrel, since both actions involved the illegal practice of dentistry.

In addition to the Affidavit filed by Lowell V. Thompson, the deposition of Carolyn Sue Snawder taken on August 1, 1977, in the case of *James Renfro, Jr.* v. *Carolyn Sue Snawder, et al.*, Jefferson Circuit Court, Action No. 230565, was read into the record as evidence against James E. Renfro, Sr. This deposition was admitted into evidence pursuant to the Kentucky Rules of Civil Procedure 32.01 on June 2, 1978 for the reason that Carolyn Sue Snawder was prevented from attending the trial by illness. (T.E. dated 7-24-78, p. 22). It was learned on that date from attorney Frank W. Burke, counsel for Our Lady of Peace Hospital, that Mrs. Snawder had been subpoenaed by both sides, but that she was admitted to said hospital on May 23, 1978 and that she was under the care of Dr. Robert Lehman. Mrs. Snawder testified by deposition that prior to the taking of her warrant at the Jefferson County Quarterly Court on

May 27, 1976, she had gone to James Renfro, Sr. for the purpose of having dentures made. She stated that when she arrived, her mouth was examined by Mr. Dan Hauner, and that James Renfro, Sr. and James Renfro, Jr. were also present. She testified that Mr. Hauner spoke with James Renfro, Sr., and that Renfro, Sr., then took an impression of her mouth. (T.E., p. 32). She stated that approximately two weeks later she went back and picked up the finished dentures from James Renfro, Sr. and paid him One Hundred Sixty-Two Dollars Seventy-Five Cents ($162.75). She further testified by deposition, that she was dissatisfied with her teeth, and later contacted the Kentucky Dental Association who referred her to legal counsel. The record of the proceedings indicates that on October 4, 1976, James Renfro, Sr. was found guilty of practicing dentistry without a license in violation of KRS 313.020.

This rather lengthy trial ended on July 18, 1978, and the Court found James Renfro, Sr. in contempt of court and fined him Five Hundred Dollars ($500.00) and the Court also issued a permanent injunction against James E. Gambrel restraining him from violating the Dental Practice Act and from engaging in the illegal and unlicensed practice of dentistry.

These actions involved similar legal issues concerning alleged violations of KRS 313.010(2). Both Defendants were registered dental laboratory technicians charged with practicing dentistry without a license in violation of the aforementioned statute. The Peti-

tioner in both actions was the Kentucky Board of Dentistry.

Based on the similar set of factual circumstances and the court being required to determine if both registered dental laboratory technicians violated KRS 313.010(2), it is apparent that the court did not abuse its discretion in consolidating these cases for trial.

2. The Petitioner's Due Process Right to Counsel Was Not Violated.

The Defendants allege that they were not given an opportunity to have a fair trial based on the fact that the Defendants' counsel, Franklin Yudkin, allegedly became ill during one of the trial proceedings and left the courtroom on the afternoon of May 12, 1978 and went to visit the doctor for gastritis. The trial court's discretionary powers of passing upon applications for continuance based upon the illness of counsel clearly include the power of passing upon fact issues as to the existence of the alleged illness and its effect upon the ability of the attorney to be present and represent his clients. Appellate courts throughout the United States have been reluctant to interfere with the trial court's refusal of a continuance because of the insufficiency of the showing as to health or incapacity.

Pointing out that the Defendants' attorney must have been physically and mentally able to attend to the case on the trial since the defense interposed by them appeared from the record to have been ably presented, and there was no showing that injury resulted to their health from their labors, the court in *Crabtree*

Coal Mining Company v. *Samples Administrator*, 24 Ky. L. R. 1703, 72 S. W. 24 (1903), held that no error resulted from the denial of a continuance claimed on the grounds that the Defendant's attorneys were in too exhausted a state to go to trial, having been keeping watch with sick members of their family and engaged in court during the day for some time.

The Appellant wishes to comment on the factual background which led the trial court to make a determination that the Appellant's counsel was feigning sickness. Appellee has attached three (3) Affidavits by Index which states the events which transpired on May 12, 1978 shortly before Mr. Yudkin decided to leave the courtroom. These Affidavits are not only drawn by Appellee's counsel, but also by an impartial correctional officer named Lester H. Vest.

All three Affidavits referred to in the Index show that at approximately 5:00 p.m. on May 12, 1978, Mr. Yudkin asked Judge Charles Anderson to conclude the trial so that he could attend the Kentucky Bar Association banquet dinner scheduled that evening. Some minutes later, Mr. Yudkin stated that he could not believe that this trial was still continuing and the court instructed Mr. Yudkin that several lay witnesses were waiting outside of the courtroom to testify and that the judge wanted to hear their testimony so that it would not be necessary for them to return and be resubpoenaed to the court for another date. At approximately 5:45 p.m. Mr. Yudkin stated that he was tired and laid his head on a book while the trial was in progress. No one could see any objective signs of

sickness and apparently Mr. Yudkin was able to follow the proceedings and understand the nature of the testimony, because at one point, Mr. Yudkin's tape recorder went off, and he immediately raised his head and got one of his assistants to change the tape for him. Mr. Yudkin was apparently distressed and upset that the court would not continue the case to allow him to attend the banquet. Mr. Yudkin then got up without assistance and left the courtroom and did not return.

It is important to note that this was not a one day trial. After May 12, 1978, the case was continued until June 2, 1978 and subsequently to June 8, 1978 and subsequently to June 23, 1978. Any witnesses which Mr. Yudkin felt that he did not have an opportunity to examine, question or cross-examine, would have been available for trial at any subsequent date. There is nothing in the record to indicate that any of these people were even attempted to be resubpoenaed. It is also important to note that the Appellee made Mr. Donald White appear again and that he was called by the Appellants as an adverse witness and thoroughly examined again. There was no further showing at any subsequent time or any subsequent date of counsel's inability to try the case during this lengthy proceeding. It should be also noted that in subsequent proceedings, Mr. Yudkin was assisted by able counsel Shelton Gardner of Chicago, Illinois.

The courts have held that a denial for a motion for continuance in an injunction proceeding was not an abuse of discretion where a motion was based on certificates of hospital emergency interns and a doctor in-

dicating that counsel had upper respiratory tract infection since neither certificate indicated that counsel's health would be impaired by courtroom appearance and no further showing of inability to try the case was made during the five day proceeding. *Timmons* v. *South Carolina, Tri-Centennial Committee,* 254 S. C. 378, 175 S. E. 2d 805. It is apparent from a review of these facts and the Affidavits filed that the Appellants were not denied their right to counsel. It is also evident that the court did not abuse its discretion in refusing to continue this trial based on the statements and actions of defense counsel on May 12, 1978.

3. The Trial Court Did Not Deprive the Petitioner of His Constitutional Right to a Fair Trial.

The Petitioner alleges that the trial court denied him a fair trial because a witness was recalled to the stand for subsequent cross-examination by Petitioner's attorney, Franklin Yudkin. It is inconceivable that such action by the trial court would do anything but inure to the benefit of the Petitioner. The other twenty-two allegations concerning the trial court's alleged misconduct are totally without merit.

4. There Was Sufficient Evidence to Support the Finding of the Trial Court That James E. Gambrel Violated KRS 313.010 by Engaging in the Unauthorized Practice of Dentistry.

The Appellant correctly cites the KRS statute 313.010 which defines the practice of dentistry in the Commonwealth of Kentucky:

"Any person shall be regarded as 'practicing dentistry' who for a fee, salary or other reward paid or to be paid either to himself, or to another person, performs or advertises to perform dental operations of any kind or who diagnoses or treats diseases or lesions of the human teeth or jaws, or attempts to correct malpositions thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and the adjacent associated structures, or who takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written order or prescription of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist, . . ."

The Appellant correctly states that in order to find James E. Gambrel violated the above-mentioned statute, the Kentucky Board of Dentistry must prove that James E. Gambrel was paid or was to be paid a fee to take impressions of the human teeth or jaws to be used directly in the fabrication of an interoral appliance all without a written work order or prescription of a licensed dentist. The Appellant incorrectly states in their Brief that the Kentucky Board of Dentistry's case against James Gambrel "rested solely on the testimony of Donald L. White." In addition to the testimony of Mr. White, Doris Denton of 3712 Downing Lane, Louisville, Kentucky, was called by the

Board of Dentistry to testify against James Gambrel. Doris Denton stated that she had gone to James Gambrel's studio to have an upper plate made. Mrs. Denton stated under oath that she did not have a prescription or a work order from a licensed dentist when she went to see the Appellant, nor was she asked for one. (T.E. dated May 12, 1978, p. 86). Doris Denton states that James Gambrel took an impression of her mouth on her first visit and fitted her with the denture which he fabricated on the second and third visit. She stated that she paid James Gambrel One Hundred Five Dollars ($105.00) by check for her completed upper plate. (T.E. May 12, 1978, p. 87).

In addition to the testimony of Mrs. Denton, Betty L. Adcock of 213 Breckinridge Lane, Louisville, Kentucky also testified. Ms. Adcock states that she went to see James Gambrel and that the Appellant made both an upper and lower full set of dentures for her. She states that the Appellant took impressions of her mouth, and that she made four (4) different visits to see him and did not have a work order or authorization or prescription from a licensed dentist and the appellant did not ask her for any authorization from a licensed dentist. (T.E. Volume 1, dated May 12, 1978, pp. 89-91). Ms. Adcock further testified that she, in fact, paid Appellant One Hundred Seventy-Five Dollars ($175.00) and that this transaction occurred in Louisville, Jefferson County, Kentucky.

The Appellee's final witness, was in fact, Mr. Donald L. White of 2825 Dexley Court, Louisville, Kentucky. Mr. White testified that on May 19, 1977,

he went to Gambrel's denture studio on Durrett Lane and that he did not have a work order or prescription from a licensed dentist and that the Appellant did not tell him that one was necessary. (T.E. Volume 1, dated May 12, 1978, p. 92). Mr. White stated that he told Appellant that he had a broken upper partial plate and needed a replacement. Mr. White indicated that the Appellant took impressions of his mouth and that he agreed to pay the Appellant. Mr. White further testified that there was no dentist on the premises when he saw James Gambrel. (T.E. Volume 1, dated May 12, 1978, pp. 94-96). On June 23, 1978, during the presentation of the Appellant's case, Mr. Donald White was again called as a defense witness. At that time, Mr. White stated that:

> "When I dealt with him the understanding was that it would be in the vicinity of $175.00, while it is true he never quoted me an exact figure, it is also true that we dealt in terms of $175.00, more or less."

The evidence that James E. Gambrel violated KRS 313.010 was proven beyond any doubt. The Appellant did not take the stand to either refute any of the allegations made by the Appellee's witnesses, nor was any affirmative defense tendered.

CONCLUSION

For the reasons set forth above, the Respondent moves this Court to deny the Writ of Certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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